

Ramirez Vasques (Migration) [2019] AATA 512 (21 February 2019)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Mr Manuel Tiberio Ramirez Vasques
VISA APPLICANT:	Mrs Yaneth Calle Jaramillo
CASE NUMBER:	1621858
DIBP REFERENCE(S):	BCC2014/2428933
MEMBER:	Simone Burford
DATE:	21 February 2019
PLACE OF DECISION:	Perth
DECISION:	The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa: • cl.309.211 of Schedule 2 to the Regulations • cl.309.221 of Schedule 2 to the Regulations

Statement made on 21 February 2019 at 11:18am

CATCHWORDS

MIGRATION – Partner (Provisional) (Class UF) visa – Subclass 309 (Partner (Provisional)) – genuine and continuing relationship – living in separate countries – visitor visa to Australia refused – length of relationship – age difference – consistent evidence – credible witnesses – decision under review remitted

1.

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65

Migration Regulations 1994 (Cth), r 1.15A; Schedule 2, cls 309.211, 309.221

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Immigration on 3 December 2016 to refuse to grant the visa applicant a Partner (Provisional) (Class UF) visa under s.65 of the *Migration Act 1958* (the Act).
3. The visa applicant applied for the visa on 10 September 2014 on the basis of her relationship with her sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Relevantly to this matter the primary criteria include cl.309.211.
4. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211 because the delegate was not satisfied that the visa applicant was the spouse or de facto partner of the review applicant.
5. The review applicant appeared before the Tribunal on 18 May 2018 to give evidence and present arguments. The review applicant was accompanied by two of his daughters at the hearing. The Tribunal attempted to take oral evidence from the visa applicant via telephone from Columbia. However, on that day telephone connections to Columbia made it difficult for the interpreter and the visa applicant to hear one another and a decision was made to adjourn the hearing to another date. Prior to adjourning the hearing the Tribunal took evidence from Ms Patricia Mejia, the review applicant's daughter, and from the review applicant.
6. At this time the review applicant was living in Canberra where he moved following the filing of the review application. He had travelled to Perth for the hearing. As the review applicant had recently undergone surgery and had limited mobility the Tribunal made arrangements for the review applicant to attend the further adjourned hearing via video link from Canberra.
7. The matter was listed again for 23 May 2018 and the review applicant appeared again before the Tribunal on that date. Again connections to Columbia made it difficult for the visa applicant to give evidence and the hearing was adjourned.
8. The matter was listed for the further adjourned hearing on 17 July 2018. On that day the phone connections to Columbia were of a sufficient quality to enable the visa applicant to give evidence. The Tribunal received evidence from the visa applicant and further evidence from the review applicant.
9. The hearing was conducted with the assistance of an interpreter in the English and Spanish languages. The review applicant was represented in relation to the review by his registered migration agent.
10. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

11. The issue in the present case is whether the visa applicant is the spouse or de facto partner of her sponsor, the review applicant.

Whether the parties are in a spouse or de facto relationship

12. Clauses 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the spouse of the review applicant who is an Australian citizen.
13. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3) of the Regulations, which is attached to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

14. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. The parties provided an officially translated copy of an 'Extract from Certificate of Marriage' issued by the National Civil Status Registry Electoral Organisation. The certificate was issued on 7 April 2014 in Quindio, Montenegro, Columbia. It records a marriage between the parties took place on 7 April 2014 in Quindio, Montenegro, Columbia. The Tribunal has no information to suggest this was not a valid marriage under local law. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spousal relationship met?

15. As noted above, in forming an opinion on whether the parties are in a married relationship, consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects of the relationship and the nature of the visa applicant and review applicant's household and their commitment to each other as set out in r.1.15A(3) of the Regulations.
16. The Tribunal has before it the Department's file relating to the visa applicant. The Tribunal also has had regard to the material referred to in the delegate's decision, which was submitted by the review applicant with the application for review, and other material available to it including material submitted by the review applicant prior to and following the Tribunal hearing.
17. The Tribunal notes that the parties provided additional information to the Tribunal including third-party statutory declarations from friends and family of the parties supporting the relationship and their account of its history and attesting to the ongoing nature of the relationship.
18. The visa applicant and the review applicant both gave evidence at the hearing. The Tribunal questioned them at length about their relationship. The Tribunal took evidence regarding the development of their relationship, their relationship history, knowledge of each other's

background and family history, financial, social and household aspects of their relationship and the nature of their commitment to each other. Their responses were consistent.

19. While the Tribunal had some concerns about the timeline presented for the relationship and the account of events in Columbia following the marriage, having regard to all the evidence and to their testimony, the Tribunal found the visa applicant and sponsor to be credible witnesses and accepts their oral evidence on this basis.

20. *Relationship background*

21. The review applicant, Mr Manuel Tiberio Ramirez Vasquez, is a 77-year-old Australian citizen. The review applicant has declared one prior marriage on his sponsorship form (Form 40SP). He married in August 2008 and divorced in December 2012. A divorce certificate was provided. There are no children from this marriage. At the hearing he told the Tribunal he has had several prior relationships. He indicated he was married around 54 years ago in Columbia and has two daughters from that relationship. His wife died around 1971 and he remarried two years later in around 1973 and divorced 'around 10 to 20 years ago' and has one daughter from that relationship. He entered into a de facto relationship and has two sons from that relationship. He can't remember exactly when he entered that relationship but thought it was around 1980. He was separated from his wife at the time and they were divorced later. Around 1985 he came to Australia on a tourist visa and entered into a de facto relationship with Ms Geny Campos, who was an Australian citizen or permanent resident, in 1986. He was granted a partner visa in 1993. He married Ms Campos in 2008 and they divorced in 2012. There were no children from that relationship. In 1996 he returned to Columbia and brought two daughters back to Australia with him. His son came in 2007 on a student visa. In total the review applicant has five adult children from his previous relationships. Two live in Australia. One lives in Canada, one in Columbia and one in the United States.
22. The review applicant is sponsoring the visa applicant, Mrs Yaneth Calle Jaramillo, a 48-year-old Colombian national currently residing in Montenegro, Columbia. The visa applicant was previously married in 1996 and divorced in 2014; however, she told the Tribunal that she and her previous husband separated after around five years prior to the divorce. A copy of an officially translated divorce certificate was provided. There were no children from that marriage.
23. The parties provided testimony that they first met in Columbia as family friends. They lived in the same suburb and met when the visa applicant was about eight years old. At that stage the review applicant was in his 30's. There was a good friendship between the parties' families until the review applicant came to Australia. The review applicant saw the visa applicant on return trips to Columbia but was married at the time as was the visa applicant.
24. The review applicant went to Canada after his divorce in 2012. He was there for several months then returned to Australia. In October 2013 the review applicant returned to Canada and the parties reconnected on Facebook in November 2013. The parties exchanged messages and realised they had met several years before in Columbia. The parties claim to have started a relationship communicating by Facebook and telephone.
25. The review applicant travelled to Columbia in February 2014 to meet the visa applicant and establish a formal relationship. The parties spent some weeks together in Columbia and were engaged. The parties indicated that because they had known each other for so many years there were no objections to the relationship from their families. The parties provided evidence that prior to their marriage they spent time together in the evenings following the visa applicant's attendance at her job. They submitted that the review applicant bought a

motorcycle for the visa applicant that she travelled on to work, and that he took the bus in the evening to meet her at work and travel home with her.

26. The parties married in Montenegro, Columbia on 7 April 2014. A copy of the marriage certificate was provided.
27. Following their wedding the parties lived together in an apartment in Montenegro. The parties indicated their initial plan was to apply for a partner visa and wait for the grant of the visa in Columbia. However the review applicant claims he became the subject of death threats and was forced to leave Columbia shortly after the wedding.
28. The review applicant returned to Australia and lodged a partner visa in September 2014. The couple maintained contact through telephone, text and email.
29. Following the refusal of the partner visa the parties arranged to meet in Chile in 2017 and spent 12 days together there. They spent time with several friends who live in Chile including the visa applicant's sister and niece. At the time of the hearing the parties indicated that the visa applicant had not applied to travel to Australia as a tourist as they believe she will be denied a visa and the money involved in making an application will be wasted. Following the hearing the parties submitted copies of a document indicating that the visa applicant applied for a visitor sponsored family visitor visa (subclass 600) on 6 November 2018. This Visa was refused on the 3 December 2018 on the basis that the delegate on that application was not satisfied that the applicant intended for January temporary visit to Australia.
30. Following the hearing the review applicant submitted documents indicated that the parties travelled to Ecuador including to the Galapagos Islands together in February 2019. Photos and travel documents from this trip were submitted. They submitted that they met in Ecuador as the review applicant is unable to return to Columbia due to threats against this life.

31. Financial aspects

32. The Tribunal has had regard to the evidence provided relating to the financial aspects of the relationship, including joint ownership of real estate or other major assets and any joint liabilities, the extent of any pooling of financial resources, especially in relation to major financial commitments, whether one person in the relationship owes any legal obligation in respect of the other and the basis of any sharing of the day-to-day household expenses.
33. The parties provided financial information which reflects their financial circumstances.
34. The Tribunal questioned the parties about the details of their income and assets. They displayed knowledge of each other's income and assets which was consistent with a genuine married relationship.
35. The Tribunal finds that the parties do not jointly own any real estate or other significant assets. The review applicant has savings but is currently on a government pension. The visa applicant is no longer working and is receiving some financial support from the review applicant in the form of monthly money transfers to Columbia. Some receipts for money transfers to Columbia were provided. The parties do not have any significant assets or liabilities or any legal obligations with respect to each other.
36. While there is limited evidence of the parties combining financial resources the Tribunal notes that the parties reside in separate countries and recognises that this makes the pooling of resources and sharing of day-to-day expenses difficult. The Tribunal finds that they share day-to-day expenses when they are living together. However having regard to the

fact that they have lived separately for the majority of the time since their marriage the Tribunal places little weight on the lack of evidence of consistent sharing of day-to-day expenses.

- 37. The Tribunal finds that the parties displayed a working knowledge of each other's financial arrangements consistent with a genuine married relationship.
- 38. Based on the evidence provided, the Tribunal finds that the parties' financial arrangements are consistent with a genuine married relationship.

39. *Nature of the household*

- 40. The Tribunal has had regard to the evidence as to the nature of the household including any joint responsibility for the care and support of children, the parties' living arrangements and any sharing of the responsibility for housework.
- 41. The parties do not have any children together. The review applicant's children are now adults. The visa applicant has no children and the parties do not have any plans for children.
- 42. The parties have not shared a home other than for the short period of the review applicant's visit to Columbia in February 2014. The parties also provided a statement from their landlord in Columbia, Mr Trujillo. That statement attested to the fact that the apartment was occupied by the parties as husband and wife. Mr Trujillo confirmed that Mrs Fabiola Jaramillo (the visa applicant's mother) appears on the contract as a guarantor and that she did not occupy the property.
- 43. The parties provided a lease agreement for that address. The agreement lists the review applicant as the tenant and the visa applicant's mother as a guarantor. The parties indicated that it was required to have a property owner as a guarantor on the lease. The parties also provided evidence of having purchased furniture for the home including a bedroom suite, washing machine, fridge, living and dining room set and television. The review applicant also purchased a motorcycle to facilitate the visa applicant's commute to work at 'Parque del Café' theme park. Following the review applicant's departure from Columbia the visa applicant moved back into an apartment with her mother for financial reasons.
- 44. The parties testified that whilst they were sharing the home in Columbia the review applicant took care of the household while the visa applicant was working. They indicated that if the visa is granted the visa applicant would plan to study English and obtain a qualification which would enable her to work in Australia so she could assist with household expenses.
- 45. The parties testified that when the review applicant and the visa applicant have met in third countries, which they have done twice, they share accommodation.
- 46. As the parties have not lived together in Australia or overseas for longer than a short period the parties have had limited opportunity to share their living arrangements and have not been able to establish a permanent joint household. However, given their circumstances the Tribunal does not place significant weight on their current lack of a shared household.

47. *Social aspects of the relationship*

- 48. The Tribunal has had regard to the evidence provided as to whether the parties represent themselves to others as being married to each other, the opinion of their friends and acquaintances about the nature of the relationship and any basis on which the parties plan and undertake joint social activities.

49. The parties have provided supporting material including photographs together and in group settings and with family and friends. There is third party support for the relationship in the form of statements from members of both the visa applicant and review applicant's families and friends. As noted above, one of the review applicant's daughters gave evidence at the hearing in support of the relationship.
50. Ms Gloria Patricia Ramirez, the review applicant's daughter, testified at the hearing that she had met the visa applicant when she was originally living in Columbia and their two families were close. She testified that when her father would visit Columbia they would see the visa applicant's family and at that time her father would be staying with her in Columbia. She testified in support of the account of the parties meeting whilst the review applicant was living with her in Canada where she now resides. She also supported their account of the review applicant being forced to leave Columbia. She testified that she believes that the relationship is genuine as she has observed how much the parties care for one another. She indicated she wasn't surprised when the parties entered into a relationship and was aware of the plan for her father to marry the visa applicant when he returned to Columbia in 2014. She indicated the family is anxious for the parties to be reunited as the review applicant has had health issues and needs the care of his wife.
51. Mrs Luz Elena Gonzalez Vallebuena, a friend of the visa applicant provided a statement that she met the review applicant in February 2014 when he came to Columbia and proposed to the visa applicant. Mrs Gonzalez testified that she became friends with the review applicant and observed how happy the couple was together and how happy they were when the visa applicant's mother approved marriage. She also indicated that she attended the couple's wedding and that the wedding was attended by many other friends and family of the couple. She indicated she continued to visit them at their apartment in Columbia. She testified that the visa applicant was distressed by the unexpected separation from her husband following his departure from Columbia.
52. Mrs Fabiola Jaramillo, the visa applicant's mother, provided a statement indicating that she met the review applicant a long time ago when he was a neighbour living in Columbia. She declares that she has witnessed the development of the relationship between the couple and confirmed their account of meeting via Facebook and communicating prior to their engagement with her approval. She also indicated that the visa applicant has been distressed at the separation from her husband following his departure from Columbia.
53. The parties also submitted a statement from Mr Carlos Arturo Arcila, who was the pastor of the Baptist Spanish church in Piara Waters, Western Australia, where the review applicant attended church when he was living in Perth. Pastor Arcila declared that he is aware that the review applicant and visa applicant had married in Columbia and that the visa applicant is unable to live in Australia because she does not have a visa to enter. He declares that he has witnessed the negative impact the visa refusal has had on the review applicant.
54. The Tribunal places weight on these statements as support for the parties' account of the relationship and is evidence of its social recognition.
55. The evidence portrays a couple who are recognised as being in a married relationship by their families and friends. This is consistent with the way the couple presented at the hearing. The Tribunal finds, based on the supporting evidence, that the parties represent themselves socially to be in a married relationship and are recognised as such.
56. *Nature of the parties' commitment and any circumstances of the relationship*
57. The Tribunal has had regard to the evidence provided in relation to the nature of the parties' commitment to one another including the duration of the relationship, the length of time they

have lived together, the degree of companionship and emotional support they draw from each other, and whether they see the relationship as long-term.

58. The parties claim to have been in a relationship since late 2013. They married in April 2014. The Tribunal recognises the length of the relationship.
59. The parties provided evidence of constant contact by telephone and text when separated. A significant amount of text material was provided with official translations. The Tribunal also notes that while the parties have not reunited in Columbia due to threats posed to the review applicant, they have made the effort to meet in a third country including in early 2019 in Ecuador. The parties submitted and the Tribunal accepts that financial constraints have made it difficult for them to reunite more frequently. The Tribunal notes that the visa applicant has made an application for a visitor's visa to come to Australia to care for the review applicant; however, this visa was refused.
60. The Tribunal accepts that the parties have attempted to maintain their relationship for a significant amount of time at great distance and that this has placed a strain on the parties and on the relationship. However the material submitted to the Tribunal evidences an ongoing commitment to the relationship consistent with a genuine married relationship.
61. The Tribunal notes that there is a significant age difference between the parties. The age gap was discussed with the parties at the hearing and they indicated that while they acknowledged that there was an age difference, they had known each other for a long time and they did not have any issue with the age difference. It also appeared from third-party testimony that the relationship is accepted by their families, notwithstanding a significant age gap.
62. The Tribunal also notes that the parties placed significant emphasis on the care required by the review applicant and the fact that that the visa applicant was needed in Australia to provide that care. The Tribunal asked the parties about this element of the relationship. The parties submitted that whilst the visa applicant is desirous of providing care and support for the review applicant the relationship is based on mutual love and respect and a desire to spend the rest of their lives together as a married couple. The Tribunal accepts that evidence.
63. The parties presented at the hearing as a committed couple. This was supported by third party evidence. They demonstrated they provide companionship to one another and view the relationship as long-term.

64. *Conclusion*

65. Based on the evidence before it the Tribunal is satisfied that at the time of the application and at the time of the decision the parties have a mutual commitment to a shared life as a married couple to the exclusion of all others. The Tribunal is satisfied that the parties are in a relationship that is genuine and continuing and that they live together or not separately and apart on a permanent basis.
66. The Tribunal is also satisfied the parties are not related by family.
67. On the basis of the above the Tribunal is satisfied that the requirements of s.5F are met at the time the visa application was made and the time of this decision.
68. Accordingly the Tribunal is satisfied that the visa applicant meets the criterion in cl.309.211(2) and therefore she meets cl.309.211.

69. The Tribunal is satisfied that the visa applicant continues to meet the requirements of cl.309.211(2) at the time of this decision as the married partner of her sponsor. Therefore the visa applicant satisfies cl.309.221.
70. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 309 visa.

DECISION

71. The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:
- cl.309.211 of Schedule 2 to the Regulations
 - cl.309.221 of Schedule 2 to the Regulations

Simone Burford
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).